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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re MARILYN T., a Person Coming Under the Juvenile Court Law.	
SAN FRANCISCO DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. ANTOINE T., Defendant and Appellant.	A124532 (San Francisco City and County Super. Ct. No. JD07-3390)

Antoine T. is the biological father of Marilyn T., the subject of this dependency action initiated by the San Francisco Department of Human Services (department) immediately after Marilyn was born drug-exposed, to a mother incapable of caring for her due to longstanding drug use and who had lost custody of two children (by other fathers) after failure to reunify. Father admitted biological paternity from the start, and genetic testing confirmed this. He nevertheless sought presumed father status and services only on the eve of a plan selection and implementation hearing (plan hearing) (Welf. & Inst. Code, § 366.26),[1]) three months after the mother's reunification services were terminated.

Father appeals the denial of his motion for status and services, which the court treated in part as a petition for modification. We affirm.

[1] All unstated section references are to the Welfare and Institutions Code.

BACKGROUND

The original petition, filed in late December 2007, charged father as an "alleged" father unable to care for Marilyn or protect her from abuse by the mother (§ 300, subd. (b)). Father claimed paternity but declined an assessment for custody and said he was unable to care for the child. He had an extensive criminal history, and his inability to provide was highlighted by his arrest in January 2008, for drug-related probation violations. His public defender anticipated a 90-day jail term. The department therefore did not consider father for placement, but recommended that he cooperate in developing a case plan once he attained presumed father status and showed an interest in reunification.

Marilyn remained hospitalized for three weeks after birth, suffering withdrawal from exposure to opiates, cocaine and methadone. Then she entered foster care, where she still had symptoms but, after a year, emerged healthy and developmentally on track.

Father had counsel appointed for him early in this case and remained incarcerated. He underwent genetic testing, at the department's instigation, and in early April 2008, it confirmed him to be Marilyn's biological father (to a 99.99% certainty).[2] At a jurisdictional hearing of April 11, that father attended with counsel, he waived trial and submitted. The sustained allegations of an amended petition, as interlineated, were that father, now designated the "biological father," had an extensive felony history including unlawful sexual intercourse with a minor, might have substance abuse problems requiring assessment and treatment, and was a registered sex offender due to a felony conviction for pimping and pandering of a minor. The department's report recommendation was that father be provided no services because he had not attained presumed father status.

On July 11, father appeared with counsel at a continued dispositional hearing and again submitted. The court followed report recommendations of reunification services for the mother but none for father. Father apparently did not contest the lack of services or appeal. The department had required both parents to address substance abuse issues,

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[2] All dates are in 2008 unless otherwise indicated. Father had six other children, ages 3 to 21 years. None were evidently in his care, and the department reported having no information on the alleged half-siblings and thus unable to arrange visits with them.

but father's stated view at disposition was that he used drugs recreationally, could maintain a job and apartment, and was therefore not addicted. He had evidently been released from jail by then, for he, like the mother, was granted supervised visits pending a six-month review set for September.

The provision of services for the mother followed vacillation by her and the department. She conceded drug use but, while initially open to inpatient drug treatment, changed her mind and wanted only outpatient services. She had failed before with such services but entered an outpatient program in late February. The mother's initial progress there and successful twice-weekly visits with Marilyn prompted the department to support further services by the time of disposition. On July 15, however, just four days after disposition, mother was arrested for entering a San Mateo court house with a loaded gun and was charged with three felonies. Dirty and diluted drug tests in the months that followed, plus missed classes and ceased visits, led the department to recommend terminating services, for it did not seem that she would be able to reunify within another six months after the review.

Father had still not sought presumed father status, but the review report stated that he would be referred to a parenting class, given discomfort during visits with Marilyn. An addendum report prepared in late October for a continued hearing date of November 18 noted that, despite a referral and prodding by the authoring social worker, father had not followed through with the parenting class. But because he said on October 21 that he was "willing to do whatever was necessary for him to obtain custody of Marilyn," the social worker referred him once more (a fourth time). On July 15, father was arrested and jailed for five days, for another probation violation.

At the review on November 18 (over three months beyond the original six-month date), the court followed report recommendations, terminating services for mother and setting a plan hearing (§ 366.26) for March 18, 2009. The mother was no longer in any substance abuse program and had served five weekends in jail for the firearm offenses, as reduced to misdemeanors. We lack a reporter's transcript of that hearing, but the written order states in handwriting: "(father waived svcs)."

Father did not challenge the plan setting. Mother did, filing a notice of intent to petition for writ review, but we dismissed the matter, on December 29, after she failed to file a petition (Cal. Rules of Court, rule 8.452(c)(1)).

On February 5, 2009, father filed a standard form JV-505 ("Statement Regarding Parentage") that stated that he wanted the court to enter a judgment of parentage, had told family members he was Marilyn's father, had visited Marilyn once or twice a week since August, had brought her toys, clothes, and food during visits, had undergone the genetic testing the previous year that showed him to be the biological father, and was married to the mother when Marilyn was born. The claimed marriage was evidently new information, and he attached a Nevada marriage certificate indicating a Las Vegas marriage to the mother in April 2005.

A report of February 23, 2009, for the plan hearing related that the mother had twice-weekly visits and developed a strong bond with Marilyn but was still struggling with drug issues, and that Marilyn deserved the permanency of adoption. It would take additional time to find her an adoptive home. Father had been accorded "the opportunity to visit twice a week at the foster parents' home."

The next day, February 24, 2009, father filed a motion for presumed father status and reunification services, citing his marriage to the mother, recent request for a paternity judgment, visits, and initial reliance on the idea that the mother would reunify. To further explain his delay in coming forward, father declared that he was unable to visit Marilyn until released from jail in June 2008, had submitted to a recommendation of no services for him because "I did not want to set myself up to fail at reunification due to my incarceration," and was willing now to do anything to reunify with Marilyn. This motion, and an earlier one he had filed for a bonding study, were heard on the March 18, 2009, the date for the plan hearing. In opposition, the department noted in part that the motion was procedurally flawed, for the reunification period had ended for the mother, and modification had to be through a section 388 petition showing new or changed circumstances and that modification was in the child's best interest.

Each parent failed, for reasons unknown to their counsel, to personally appear at the hearing, and the court found the failures to be willful. On father's motion for status and services, the court expressed consternation that father was raising this for the first time 13 or 14 months into the case, when he could have done so anytime—even through counsel while initially incarcerated. "[I]t really would have been sort of a no brainer in the early stages of this case," the court lamented; but now it was beyond the reunification period; and father no longer had an unqualified right. The court denied presumed father status and reunification services, adding that it looked like an effort to slow the adoption process. On the procedural issue, the court said it would also deny the motion if treated as brought under section 388, for father did not "present any new information as to why it's in the best interest of the child[.]"[3] The court continued the plan hearing to April 13, 2009.

A written order of denial was filed on April 7, 2009, and father appeals.[4]

DISCUSSION

Father assaults the status/services denial on two grounds. First, he argues that section 388 limitations did not apply because, even though the focus of the dependency had shifted from reunification to Marilyn's needs for permanency and stability once the court terminated the mother's services (*In re Marilyn H.* (1993) 5 Cal.4th 295, 308-309), the circumstances here of him being the biological father as well as married to the mother at the child's birth rendered him a "conclusively presumed father" entitled to services no matter when in the proceedings the information came to light. Alternatively, he argues, if

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[3] The court also denied the bonding study motion, but that ruling is not disputed. (Cf. *In re Richard C.* (1998) 68 Cal.App.4th 1191, 1197.)

[4] Neither party addresses the anomaly that father filed his notice of appeal before the written order, thus referencing only the oral rendition. There is no confusion about his intent, however, and out of caution, we treat his notice of appeal as applying as well to the formal written order. (Cal. Rules of Court, rule 8.104(e).)

Since this appeal was taken, the juvenile court has proceeded through the plan hearing and terminated parental rights. Each parent's appeal from those orders awaits separate consideration in our docket No. A126065.

the section 388 limitations did apply, he made a sufficient showing of new or changed circumstances and that the status and services he sought were in Marilyn's best interests. We reject both parts of his arguments.

I. *"Conclusive Presumed Fatherhood"*

Father's giant hurdle is the binding precedent of our Supreme Court in *In re Zacharia D.* (1993) 6 Cal.4th 435 (*Zacharia D.*), which, he concedes, upheld denial of presumed father status and services to a biological father who sought status and services after the reunification period had ended. The court held that a biological father remains an alleged father and is not statutorily entitled to services unless he attains presumed father status (*id.* at pp. 447-451) and held that statutory limitations on the reunification period were not extended in that case "by an alleged father's own failure to ascertain the existence of his child, or by his decision to wait until the 18-month hearing [the end of the period in that case] to assert his paternity claim" (*id.* at p. 452). The case also speaks to our procedural problem of father bringing a motion rather than a section 388 petition. "While a biological father is not entitled to custody under section 361.2, or reunification services under section 361.5 if he does not attain presumed father status prior to the termination of any reunification period, he may move under section 388 for a hearing to reconsider the juvenile court's earlier rulings based on new evidence or changed circumstances. [Citations.]" (*Zacharia D., supra,* at pp. 454-455, fn. omitted.) Father's situation is rendered more difficult, for he first sought status and services not just at the end of the reunification period, but three months later, before the plan selection hearing.

Father responds: "At first blush, *Zacharia D.* appears to have settled the question for this case as well"; but "the facts of this case are wholly unlike those in *Zacharia D.*, and the holding is not controlling[.]" Since he was both the biological father and married to the mother at the birth, he reasons, he was "not seeking presumed father status, but was formally establishing *conclusive presumed fatherhood*, a status which is immune from challenge by third parties," making *Zacharia D.* inapplicable. We disagree.

The department correctly argues that one of two statutory bases father invokes for conclusive status did not apply. Family Code section 7540 states: "Except as provided in

Section 7541, the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." Accepting that the cited exception (Fam. Code, § 7541 [paternity shown by blood tests]) is no hindrance given genetic testing that already showed father to be the biological father, the section still did not apply. Nothing in the record, or father's motion, suggested that the mother was "cohabiting with her husband" (Fam. Code, § 7540) when Marilyn was *conceived*, the case law construction of the section (*Brian C. v. Ginger K.* (2000) 77 Cal.App.4th 1198, 1203; *Steven W. v. Matthew S.* (1995) 33 Cal.App.4th 1108, 1115 [as codified in former Evid. Code, § 621]), or even when she was *born*, or anytime during these proceedings.

Father's other authority is Family Code section 7611, and he reasons: Presumed father status under that section (e.g., birth during marriage or after an invalid marriage attempt; postbirth marriage or attempt, with father named with consent or obligated to support; holding out child as own after receiving into home), is ordinarily rebuttable in an appropriate case by a judgment of paternity (Fam. Code, §7612, subds. (a), (c); [5] see also former Civ. Code, § 7004; *Zacharia D.*, *supra*, 6 Cal.4th at pp. 449-450 & fn. 18). Here, however, presumed status for a child being born during marriage (Fam. Code, § 7611, subd. (a)) could not be rebutted by a paternity judgment (*id.*, § 7612, subd. (c)), for there was already genetic evidence that he was the biological father. Seeking presumed father status based on the marriage in these circumstance, he seems to reason, was equivalent to raising an unrebuttable or *conclusive* presumption.

We disagree. First, we hesitate to characterize any Family Code section 7611 presumption as "conclusive" based on the facts of a given case, for that would imply lack

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[5] Family Code section 7612, subdivision (a) provides in part: "Except as provided in Chapter 1 (commencing with Section 7540) . . . , a presumption under Section 7611 is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence." Subdivision (b) of the same section directs that multiple or conflicting presumptions shall be resolved based on considerations of policy and logic, and subdivision (c) states that a presumption under section 7611 "is rebutted by a judgment establishing paternity of the child by another man." We have already concluded, in text above, that the referenced Family Code section 7540, a *conclusive* presumption, did not apply here.

of discretion. Our Supreme Court has stressed that a hallmark of the scheme is trial court discretion to let facts and policy guide rebuttal issues—flexibility inherent in language of Family Code section 7612, subdivision (a), that a presumption " '*may* be rebutted *in an appropriate action*[.]' " (*In re Nicholas H.* (2002) 28 Cal.4th 56, 63, 70; see fn. 5, *ante*.)

Second, and determinatively, we do not see how *Zacharia D.*'s holdings are affected by whether a presumption is rebuttable or conclusive. The case hinges not on the *nature* of a presumption, but its *timing*. It explains that a balancing of competing fundamental interests has produced a system where the parents' interests predominate throughout a time-limited reunification period, and the child's interests in stability and permanence predominate thereafter. (*Zacharia D.*, *supra*, 6 Cal.4th at pp. 446-447.) Thus: a reunification period is "not extended . . . by an alleged father's own failure to ascertain the existence of his child, or by his decision to wait until the 18-month hearing to assert his paternity claim" (*id.* at p. 452); "[o]nce a child is placed in that system, the father's failure to ascertain the child's existence and develop a parental relationship with that child must necessarily occur at the risk of ultimately losing any 'opportunity to develop that biological connection into a full and enduring relationship' " (*ibid.*); "if a man fails to achieve presumed father status prior to the expiration of any reunification period in a dependency case, whether that period be 6, 12, or 18 months . . . , he is not entitled to [reunification] services," and his only remedy is "to file a motion to modify under section 388" (*id.* at p. 453).

Exceptions arise where a biological father lacks notice of the proceedings during the reunification period. (E.g., *In re Mary G.* (2007) 151 Cal.App.4th 184, 204-205 [man identified by mother as biological father was not located until months later, after a denial of services to mother resulted in lack of reunification period]), but that is not our case. Father was identified from the very start as an alleged father, participated with counsel before and throughout the jurisdictional, dispositional, and reunification stages, had his paternity biologically established through genetic testing done at the department's instigation, and faced no interference from anyone in timely asserting presumed father status. He had counsel and was on notice from early reports that only his lack of

presumed father status stood in the way of him receiving services. He declined at the very outset to be assessed for custody and made no effort at the disposition or the plan setting to obtain services. He had visits whenever not incarcerated and was repeatedly referred to a parenting class in the evident hope that he might eventually qualify himself as a presumed father.

We therefore hold that father's motion for status and services, three months after termination of services, came too late to entertain outside the context of a section 388 petition and that the court below correctly recognized this and treated the motion as a section 388 petition. (*In re Eric E.* (2006) 137 Cal.App.4th 252, 257-260 (*Eric E.*) [motion treated as section 388 petition where based on a voluntary declaration of paternity at birth raised only after setting of a plan hearing].)[6]

II. *The Section 388 Elements*

" 'A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child. [Citation.] A parent need only make a prima facie showing of these elements to trigger the right to a hearing on a section 388 petition and the petition should be liberally construed in favor of granting a hearing to consider the parent's request.' [Citation.]" (*In re Mary G.*, *supra*, 151 Cal.App.4th at p. 205.)

Father's briefing is extraordinarily—perhaps artfully—vague about which order he seeks to modify, and this is key, of course, to identifying what, if any of his evidence, was "new." He speaks of circumstances being "different from when the case first came to the juvenile court's attention," but we are aware of no authority allowing such a retrospective review of parental status. Here, his status was addressed in every report since the start of the case, and the court's November 18 order terminating services and

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[6] Significantly, *Eric E.* applied *Zacharia D.*'s holdings to a case where status was sought through a voluntary declaration of paternity, which is statutorily equated with a judgment of paternity and is thus as close to a "conclusive" presumed father presumption as one can get. (See discussion in *In re Liam L.* (2000) 84 Cal.App.4th 739, 745-747.)

setting the plan hearing, three months before father's petition, was the last to treat him as a mere biological father, incidentally noting, "(father waived svcs)." We therefore use that date as the reference for "new" evidence or changed circumstances.

The motion identifies these circumstances: his marriage to the mother, his request for a paternity judgment, his inability to visit Marilyn until out of jail, his visits since then, his reliance on the idea that the mother would reunify, his reluctance to "set myself up to fail" at reunification due to incarceration, and his willingness to "do anything to reunify" with Marilyn. Most of those circumstances obviously did not qualify as new or changed since November 18. His marriage was years earlier and simply undisclosed by him; his initial jailing and inability to visit was old news; and he had been allowed visits since before the disposition, and granted them ever since. Thus his visits with Marilyn had been going on for months before November 18. His reliance on the mother reunifying mirrors reasons rejected in *Zacharia D.*, where the father said he " 'thought it was time [since the mother] was losing her baby,' " and that " 'it was now or never' " because " 'she was going to lose him at the 18-month review . . . .' " (*Zacharia D.*, *supra*, 6 Cal.4th at pp. 441, 443, 456.) If this were enough, the time-limited reunification period at the heart of *Zacharia D.* could be thwarted by obligating agencies to offer multiple reunification periods, end to end, as potential fathers strategically came forward.

All that was "new" since November 18 was that father changed his mind about wanting to reunify and continued visiting. His request for a paternity judgment was just evidence of his changed mind. He was already known to be the biological father, and a judgment could not serve to rebut a presumption that someone else was the father.

In his briefing, father always uses "may" to qualify the section 388 elements, claiming, "circumstances may have changed," and providing him services "may have served the minor's best interests." This reflects reliance on the case law standard (set out above) for granting a hearing rather than denying a petition ex parte. It also implicitly reflects a reading that the court denied him a chance to present evidence beyond his attached declaration and other exhibits. We reject that reading.

Father's motion for status and services lacked a standard recital that the motion would be based in part on "any . . . evidence and testimony as may be presented at the hearing on the motion." What we have quoted is boilerplate from father's motion, just three days earlier, for appointment of an expert to conduct a bonding study, and this strongly suggests that omitting that language from his motion for status and services was no accident. Nothing in the latter motion urged that any evidence would be provided outside the motion papers. The court also set both motions to be heard on March 18, 2009, rather than issuing an outright denial order. At the hearing, father's counsel offered no suggestion that evidence beyond the motion and declaration was available, and we note that father himself—whom the court found without dispute here to be willfully absent—was not in court to give testimony. On this record, we cannot construe the court's denial as foreclosing father from presenting testimony or other further evidence. It was essentially a ruling on the merits, and we review such a ruling for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

What appeared from the motion as to new or changed facts, we reiterate, was that father had kept on visiting and changed his mind about wanting reunification since the plan setting hearing of November 18. No showing at all was made that this was in the child's best interests, and father's arguments on appeal are pure speculation based on generalities. No abuse of discretion appears.

DISPOSITION

The order is affirmed.

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Lambden, J.

We concur:

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Haerle, Acting P.J.

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Richman, J.